UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Adv. Proc. No. 08-01789-smb (SIPA LIQUIDATION)
- - - - - - - - - - - - - - - - - - - - - - - -x
In the Matters of:
SECURITIES INVESTOR PROTECTION CORPORATION,
Plaintiff,
v.
BERNARD L. MADOFF INVESTMENT SECURITIES LLC,
Defendant.
- - - - - - - - - - - - - - - - - - - - - - - -x
BERNARD L. MADOFF,
Debtor.
- - - - - - - - - - - - - - - - - - - - - - - -x
United States Bankruptcy Court
One Bowling Green
New York, New York

February 25, 2015
10:03 AM

B E F O R E:
HON. STUART M. BERNSTEIN
U.S. BANKRUPTCY JUDGE

08-01789-smb Securities Investor Protection Corporation v.
Bernard L. Madoff Investment Securities

HEARING re Trustee's Motion to Affirm Trustee's Determinations Denying Claims of Claimants Holding Interests in S&P and P&S Associates Partnerships

Transcribed by: Lisa Beck

A P P E A R A N C E S :

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THE COURT: Suppose there was that evidence in this case, would it then be the trustee's position that they're customers?

MS. VANDERWAL: If they -- just because BLMIS or there were other people who had invested?

THE COURT: Let's say we got an affidavit from somebody who said, you know, I told -- the managing partner told me that this money was going to be invested through the partnership with BLMIS and that's why I did it.

MS. VANDERWAL: And our position is that that would not be sufficient --

THE COURT: Why not?

MS. VANDERWAL: -- because it doesn't satisfy the most essential factor that has been identified from this body of case law which is that the purported customer owned the funds that are invested with BLMIS.

THE COURT: All right. Thank you.

MS. VANDERWAL: Thank you.

THE COURT: S&P Associates and P&S Associates, collectively "the Partnerships", are Florida general partnerships that had accounts with BLMIS and essentially acted as feeder funds investing all of their partnership funds with BLMIS. This motion concerns the customer status of the general partners of the partnerships. They never invested directly with BLMIS. Instead, they invested directly with the

partnerships or indirectly with entities that became general partners of the partnerships and invested their own funds through the partnerships.

For the sake of convenience, I will refer to anyone on invested directly or indirectly with the partnerships as partners.

Except as noted, the facts are not in dispute and are derived from the declarations of Bik, BIK, Cheema, C-H-E-E-M-A, and Vineet, V-I-N-E-E-T, Sehgal, SEHGAL, submitted on this motion and the documents attached to those declarations. The partnerships were formed in 1992 and were governed by nearly identical partnership agreements. Their purpose was to invest in all types of market-placed securities, Partnership Agreements, Section 2.02, and were funded with initial capital contributions by the partners. Partnership Agreements, Section 4.01. Michael D. Sullivan and Greg Powell served as the managing general partners and had the exclusive authority to manage and control the day-to-day operations of the partnership and maintain the partnership property. Partnership Agreements, Section 8.01. Nevertheless, the general partners could have a say in the selection of brokers. For example, a majority of the partners in interest could cause the partnership to terminate or allow a specific broker selected by the majority and grant their selected broker discretionary investment powers with the partnerships' investment funds. Partnership

Agreement, Section 2.02.

In addition, the partnership agreements at Section 8.04 stated that the partners would review any broker's engagement with the partnership at the regular quarterly meetings.

As noted, the partnerships maintained accounts with BLMIS and following the commencement of the SIPA liquidation, filed customer claims with the trustee based on their alleged account statements dated November 30, 2008. According to the trustee, the partnerships' claims have been allowed in an amended amount. Each has received either payment of or the benefit of a 500,000 dollar SIPC advance and interim distributions have been made to each of them from the customer fund maintained by the trustee.

Numerous partners also filed their own customer claims. The trustee disallowed those claims on the basis that the partners were not customers of BLMIS within the meaning of SIPA. One hundred fifty-eight partners objected to his claim determinations and this motion seeks to affirm his disallowance of the partners' claims. The motion elicited the response from 78 partners represented by the law firm, Becker and Poliakoff LLP. Although approximately 50 percent of the objecting partners did not respond to the motion, I will refer to the entire group as the objecting partners.

In SIPC v. BLMIS, 515 B.R. 161 (Bankr. S.D.N.Y. 2014),

the Court reviewed the decisions by this Court, the district court and the Second Circuit relating to the customer status of persons who did not have accounts with BLMIS and instead invested with entities that, in turn, invested directly with BLMIS. To summarize briefly, customer status under SIPA is narrowly interpreted. The "critical aspect" of the customer definition is "the entrustment of cash or securities to the broker-dealer for the purposes of trading securities". The indicia of customer status include a direct financial relationship with BLMIS, a property interest in the funds invested directly with BLMIS, securities accounts with BLMIS, control over the account holders' investments with BLMIS and identification of the alleged customer in BLMIS' books and records. Finally, the claimant has the burden of showing that he or she is a customer, id. at page 165-68.

The objecting partners have failed to sustain their burden of proof. They did not entrust any cash or securities with BLMIS. They invested with the partnerships who, in turn, invested with BLMIS. They have no direct financial relationship with BLMIS. They did not deposit money with or withdraw money from BLMIS or receive investment statements or tax statements in their own names from BLMIS. The documents produced by the trustee show that all communications with or by the partnerships went through Sullivan or Powell and all deposits and withdrawals were made by them in the names of the

partnerships. Thus, even if BLMIS knew or surmised that the partnerships' BLMIS accounts were funded with partners' contributions, there is no evidence that BLMIS maintained records identifying the partners or even knew who they were, and the fact remains that the partners did not entrust anything to BLMIS.

The objecting partners nevertheless contend that the controlling decisions including Kruse v. Bricklayers and Bricklayers and Allied Craftsman Local 2 Annuity Fund, (In re BLMIS), 708 F.3d 422 (2nd Cir. 2013), and SIPC v. Morgan, Kennedy and Co., 533 F.2d 1314 (2nd Cir.), cert. denied. 426 U.S. 936 (1976), are distinguishable for three reasons. First, the partners had a specific interest under Florida law in all partnership property invested with BLMIS. Second, BLMIS knew that each partner had made a decision to entrust his or her funds with BLMIS. Third, the partners had the ability to control the investment decisions because they had the authority to allow or terminate a specific broker and allow a broker to have discretionary investment powers with the partnerships' funds.

The partners had no interest in the property at the partnerships under current Florida law. Florida Revised Uniform Partnership Act ("Florida revised UPA") declares that a partnership is a legal entity distinct from its partners. Florida statute Section 620.8201(1). "Property acquired by a

partnership is property of the partnership and not of the partners individually," id. Section 620.8203, and "Partnership property is owned by the partnership as an entity not by the partners as co-owners", id. Section 620.8501.

In addition, the partnership agreements provide that all property acquired by the partnerships would be owned by and in the name of the partnership and each partner expressly waived his right to require the partition of any partnership property. Partnership Agreement, Section 6.01.

The objecting partners did not dispute the current state of the law or the text of the partnership agreements. Instead, they argue that the partnerships were organized in 1992 under the former Florida Uniform Partnership Act ("Florida UPA") and Section 620.675 of that law provided, among other things, that "at the inception of an incident to the partnership relationship, each partner acquires certain property rights [including] his rights in specific partnership property."

The Florida UPA was repealed by the Florida Revised UPA, effective January 1, 1998, see 6 - Part 1 U.L.A. 24 (2001), but the objecting partners imply that the repeal did not affect the rights granted under the repealed law. Assuming the former law governed the partners' rights, they still had no right to the funds in the partnerships' BLMIS accounts. Former Florida statute Section 620.68 provided that subject to the

Florida UPA and the partnership agreement, a partner could not possess specific partnership property for non-partnership purposes absent the consent of all partners. There is no evidence of such consent here. But even if there was, it would be irrelevant. The partnership agreements provided, as noted, that the partners had no right to the partnership property and waived their right to partition. Accordingly, the partner had no right to possess the partnerships' BLMIS investments under the prior law and certainly has no right in the specific partnership property under the current law.

Next, the objecting partners offered no admissible evidence to support their contention that BLMIS knew that they had invested with the partnerships because they wanted to invest with BLMIS. Instead, the objecting partners cite to their responses to the trustee's request for admissions. The responses were signed by Helen Chaitman, Esquire, the attorney for the objecting partners. And the relevant response consists of multiple hearsay. It is offered to prove that the objecting partners told the managing partners who told BLMIS that the objecting partners were investing in the partnerships in order to invest in BLMIS. It is noteworthy that no objecting partner offered an affidavit to that effect that he told the managing general partners that he was investing in the partnerships in order to invest in BLMIS. Nor did the objecting partners submit an affidavit from either of the managing general

partners attesting to what they told representatives of BLMIS.

Furthermore, the partnership agreements did not mention Madoff, a significant omission given that the partnership agreements were dated December 11, 1992 and that BLMIS trading agreements were dated December 28, 1992. Thus, the partnerships with BLMIS investors from the onset. Nor is there any documentary evidence in the form of offering memoranda or partnership meeting minutes indicating that the partnerships solicited partners with a promise to invest in BLMIS, reviewed and/or approved BLMIS as a broker, invested BLMIS with discretionary trading authority or that the partnership ever informed the partners of its relationship with Madoff or BLMIS until Madoff's arrest. In fact, when Sullivan informed the P&S partners that Madoff had been arrested and all of the partnerships' funds had been invested with BLMIS, his letter did not suggest that the partners already knew that the partnership was invested with BLMIS.

But even if the objecting partners or some of them sought to invest in the partnerships in order to invest indirectly with BLMIS, they still would not be customers. They entrusted their money to the partnerships not BLMIS and they dealt with the partnerships not BLMIS. However, the partnerships hold allowed customer claims and received distributions. The partners have the right under Florida's partnership laws and the partnership agreements to look to the

partnerships to recover at least some of their losses.

Lastly, although the partnership agreements authorized the majority of the partners to direct the partnerships to select or terminate a particular broker or arm a broker with the discretionary trading authority, there is no evidence that this ever occurred. Moreover, the right belonged to 51 percent of the partners acting as a majority and did not empower any individual to dictate an investment, select the broker or withdraw money from BLMIS. As an individual, the partner could only withdraw his investment from the partnership. He had no right or ability to control his "share" of the partnerships' investments with BLMIS.

But even if the partners had some level of control over the partnerships' investments, "that fact, standing alone, would be insufficient to confer 'customer' status on appellants [the partners] given that, individually, they 'made no purchases, transacted no business, and had no dealings whatsoever' with BLMIS." Kruse, 708 F.3d at 427 (quoting Morgan, Kennedy, 533 F.2d at 1318).

Accordingly, the objecting partners have failed to sustain their burden of proving that they are SIPA customers of BLMIS. The Court has considered the objecting partners remaining arguments and concludes that they lack merit. Settle order on notice to counsel to the objecting partners and to the objecting partners that appeared pro se.

Thank you.

MS. VANDERWAL: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 10:47 a.m.)

# I N D E X

## R U L I N G S

C E R T I F I C A T I O N

I, Lisa Beck, certify that the foregoing transcript is a true and accurate record of the proceedings.

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Lisa Beck (CET**D 486)

AAERT Certified Electronic Transcriber

Date: February 26, 2015

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